Supreme Court, U.S.
FILED

(1)

No. 95-558 OCT 3 - 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

REAL PROPERTY LOCATED AT
3210 MARTIN LUTHER KING, JR., BLVD.,
PATRICIA THOMPSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

LEE COUNTY TAX COLLECTOR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. GRISCTI
Counsel of Record
TURNER & GRISCTI, P.A.
Attorneys for Petitioner
204 West University Avenue
Suite 6
Gainesville, Florida 32601
(904) 375-4460

7527
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

66 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, by failing to consider the entire evidence of the petitioner's innocent ownership of her properties.

2. Whether placing the burden of proof on a claimant to establish her defense of innocent ownership by a preponderance of the evidence in an *in rem* forfeiture proceeding under 21 U.S.C. § 881(a)(7) violates the claimant's right to procedural due process of law under the Fifth Amendment to the United States Constitution.

3. Whether the *in rem* forfeiture of seven lots of real property, a restaurant, a liquor store, a liquor license and a lounge as well as $7,791 seized from that property, all based on one act in one location on the premises, violates the property owner's right to be free from excessive fines under the Eighth Amendment to the United States Constitution.

4. Whether dismissal is required because of the Government's seizure of real properties by warrant obtained *ex parte* and without preseizure notice or opportunity to be heard, in violation of the owner's right to procedural due process of law under the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to these consolidated proceedings are:

1. The petitioner and appellant/claimant below, Patricia Thompson.

2. The appellees/defendants below, Real Property Located at 3210 Martin Luther King, Jr., Blvd., Fort Myers, Lee County, Florida, Etc., and $7,791.00 in United States Currency.

3. The respondent and appellee/plaintiff below, United States of America.

4. The respondent and appellee/claimant below, Lee County Tax Collector.

5. The claimant below, Dick Steele, in his representative capacity as Tax Collector of Lee County, Florida.

6. The claimant below, David F. Davis.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) 11

Austin v. United States, 509 U.S. __, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) 9, 13, 14, 16

Bennis v. State of Michigan, No. 94-8729 (U.S. S. Ct. *cert. granted* June 5, 1995) 12

Contents

	Page
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974)	8
Guzman v. Pichirilo, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205 (1962)	7, 8
Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993)	15
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991)	16
Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)	9
Lilienthal's Tobacco v. United States, 97 U.S. 237, 24 L. Ed. 901 (1878)	9
Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	11
Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)	10
United States of America v. 3210 Martin Luther King, Jr., Blvd., Fort Myers, Lee County, Florida, Etc., 61 F.3d 30 (11th Cir. 1995)	1, 6
United States v. James Daniel Good Real Property et al., 510 U.S. __, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993)	11, 12, 15, 16

Contents

Page

United States v. $191,910.00 in United States Currency, 16 F.3d 1051 (9th Cir. 1994) 11

United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948) 7

United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742, *reh. denied*, 448 U.S. 916, 65 L. Ed. 2d 1179, 101 S. Ct. 37 (1980) 9

Statutes Cited:

19 U.S.C. § 1615 .....3, 5, 8, 9, 10, 11, 12

21 U.S.C. § 881 ..... i, 3, 9

21 U.S.C. § 881(a)(6) 1, 4, 6

21 U.S.C. § 881(a)(7) .....i, 1, 5, 6, 7, 11, 13

21 U.S.C. § 881(d) 2, 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1345 4

28 U.S.C. § 1355 4

United States Constitution Cited:

Fifth Amendment .....i, 1, 8, 12

Contents

	Page
Eighth Amendment	i, 1, 9, 13, 14
Rules Cited:	
Fed. R. Civ. P. 52	5
Fed. R. Civ. P. 59	5
Supreme Court Rule 10(a)	6
Other Authority Cited:	
D. Smith, *Prosecution and Defense of Forfeiture Cases* (1995)	12
APPENDIX	
Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit Filed July 5, 1995	1a
Appendix B — Order of the United States District Court for the Middle District of Florida Fort Myers Division Filed July 18, 1994	7a
Appendix C — Opinion of the United States District Court for the Middle District of Florida Fort Myers Division Filed September 13, 1993	11a
Appendix D — Order of the United States District Court Middle District of Florida Fort Myers Division Filed June 24, 1994	23a

Contents

Page

Appendix E — Motion to Take Additional Testimony with Exhibits Dated January 26, 1994 ..... 28a

Appendix F — Warrant of Arrest In Rem Filed May 2, 1991 ..... 39a

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit affirming *per curiam* without published opinion is reported at 61 F.3d 30 (1995), 1995 U.S. App. LEXIS 17323. The unreported Opinion of the Court of Appeals is included in Appendix A (hereinafter "App. A"), 1a-6a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1995. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

21 U.S.C. §§ 881(a)(6) and (7) provide:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished

> or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(d) provides:

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; . . . shall apply to seizures and

> forfeitures incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof. . . .

19 U.S.C. § 1615 provides in relevant part (emphasis in original):

> In all suits or actions brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage ... where the property is claimed by any person, the burden of proof shall lie upon such claimant; ... *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. . . .

STATEMENT OF THE CASE

On May 2, 1991, the United States filed a Complaint for Forfeiture In Rem in the United States District Court for the Middle District of Florida, Fort Myers Division. The Complaint sought forfeiture under 21 U.S.C. § 881 of nine lots of real property, including a restaurant, a liquor store, and a lounge.[1]

Simultaneously, the Government filed a Notice of Lis Pendens against the real properties and sought, by *ex parte* motion, issuance of a Warrant of Arrest In Rem, which the United Sates Magistrate Judge issued without preseizure notice or hearing. (App. F, 39a-42a). The United States Marshal served the seizure warrant on May 2, 1991, posting notice of seizure on the premises and requiring the owner, Patricia Thompson, to sign an

---

1. The Government subsequently amended the Complaint to seek forfeiture of the liquor license for those businesses.

occupancy agreement to maintain possession of her properties and operate her businesses.

Law enforcement agents also searched the real properties on May 2, 1991, seizing $7,791.00 found in various locations in the lounge and liquor store. The United States subsequently filed a separate case to forfeit the currency as illegal proceeds under 21 U.S.C. § 881(a)(6).

The District Court had jurisdiction of both the real property and currency forfeitures under 28 U.S.C. §§ 1345 and 1355. The Court consolidated the two cases for trial on the Government's motion, which alleged that "the issues in both cases are substantially similar and involve . . . whether claimant Patricia Thompson is the innocent owner of the properties. . . ."

The consolidated cases were tried without a jury on October 21, 1992. Both the United States and Patricia Thompson presented witness and document evidence.[2] Among the Government's witnesses was Robert Ward, the son of Patricia Thompson's brother, Robert Williams. Ward is a convicted felon who cooperated with the Government for immunity from prosecution for his larger role in his father's drug organization, which Ward said involved nine or ten individuals. Ward testified that on one occasion soon after he first met his father in 1986, he and Williams "cooked" cocaine in coffee pots in the kitchen of Thompson's lounge. According to Ward, Patricia Thompson was working in the front of the lounge at the time and occasionally walked back to the kitchen, saying that the police had driven by or that "everything was all right." Ward conceded on cross-

2. Claimant David Davis entered into a pretrial stipulation with the Government regarding his interest in a note secured by the real properties, and claimant Lee County Tax Collector offered only argument regarding its interest in *ad valorem* taxes on the real properties, which Patricia Thompson had paid to date.

examination that a person could not tell what Ward was doing because the process does not attract attention and "you can't really tell unless you be up on it."

Following the Government's presentation of evidence, the District Court found probable cause under 21 U.S.C. § 881(d) and 19 U.S.C. § 1615. Patricia Thompson then testified and denied knowledge of, or involvement in, any criminal activity. The evidence showed that she had contacted the local police department at least forty-one (41) times to complain of criminal activity at or near her business.

After trial the parties submitted proposed findings. The District Court adopted the Government's position, concluding that Patricia Thompson had not met her burden of proving innocent ownership under 21 U.S.C. § 881(a)(7) because "[e]vidence indicates that Claimant Thompson knew of the illegal cocaine preparation which occurred in the kitchen of her Lounge. In several instances, she participated in this activity by serving as a lookout." (App. C, 19a). The Court held that "the liquor license, the Lounge and the currency contained therein are subject to forfeiture" but withheld a final forfeiture order pending resolution of the *ad valorem* tax issue raised by the Lee County Tax Collector. (App. C, 20a-22a).

Before the trial court entered a final order of forfeiture, newly substituted counsel for Patricia Thompson filed a Motion to Take Additional Testimony pursuant to Rule 52 of the Federal Rules of Civil Procedure. (App. E, 28a-39a). The motion proffered affidavits of several witnesses to rebut Robert Ward's testimony. Robert Williams specifically denied Patricia Thompson's involvement in drug activity. (App. E, 38a-38a). The District Court denied the motion under Rule 59 of the Federal Rules of Civil Procedure because it was not "newly discovered" evidence (App. D, 25a-26a) and subsequently entered judgment for the Government in both cases. (App. B, 7a-10a).

The Court of Appeals affirmed the forfeitures *per curiam*, *United States of America v. 3210 Martin Luther King, Jr., Blvd., Fort Myers, Lee County, Florida, Etc.*, 61 F.3d 30 (11th Cir. 1995). (App. A, 1a-6a). In its unpublished Opinion the Eleventh Circuit panel rejected the innocent owner defense for the real properties under 21 U.S.C. § 881(a)(7), reiterating the District Court's finding that "[i]n several instances" Patricia Thompson acted as a "lookout" at the lounge. The Court continued: "Because Ward's testimony supported this finding, the district court did not clearly err in concluding that Thompson knew of, and assisted in, the narcotics-related activity." (App. A, 3a-4a).[3] Regarding the $7,791, the Court simply held: "[A]s has already been stated, Thompson is not an innocent owner." (App. A, 4a). The Court also affirmed denial of the Motion to Take Additional Testimony. (App. A, 5a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals, like the District Court, failed to consider the entire record in its adjudication of Patricia Thompson's innocent ownership defense. As a result the Court of Appeals departed from, and sanctioned the District Court's departure from, the accepted and usual course of judicial proceedings, calling for the court's exercise of its supervisory power.[4]

The reviewing court rejected the innocent ownership defense solely on the basis of Robert Ward's testimony that

---

3. Although the District Court also found that Patricia Thompson is not an innocent owner of the real properties under 21 U.S.C. § 881(a)(6) (App. C, 19a), the Eleventh Circuit did not address the Government's proceeds theory against the real properties, implicitly rejecting it.

4. *See* Rule 10(a), Rules of the Supreme Court of the United States.

Patricia Thompson had acted as a "lookout" on "several" occasions when cocaine was prepared in the kitchen of her lounge. Review of the entire record demonstrates that this finding was clearly erroneous, leaving "a definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

First, Ward testified to *one* such occasion at the lounge. The lower courts' reference to "several" occasions is clearly erroneous and is an important example of the lack of precision in the fact finding below.

Second, Ward, in fact, never testified that Patricia Thompson knew what was going on when he and his father allegedly "cooked" cocaine at the lounge, and Ward never used the term "lookout" for her role on that one occasion. Ward did testify that a person would not necessarily know what he was doing when he prepared cocaine at the lounge. Neither court below acknowledged these facts. Even if the term "lookout" is a fair inference of Ward's testimony, it takes yet another inference to conclude that Patricia Thompson knew Ward and Williams were preparing cocaine or committing an act that is illegal under Title 21, which is a necessary prerequisite for forfeiture of her properties. *See* 21 U.S.C. § 881(a)(7).

Third, both the appeals court and the District Court failed to acknowledge significant facts that discredit Ward's testimony. Ward is a convicted felon whose testimony was obtained through an agreement with the Government under which he has not been prosecuted for his apparent involvement in hundreds of kilograms of cocaine. His testimony at the forfeiture trial consisted primarily of hearsay prompted through extensive leading questions by the prosecutor, discrediting its value. *Guzman v. Pichirilo*, 369 U.S. 698, 703 and n. 5, 82 S. Ct. 1095, 8

L. Ed. 2d 205 (1962). His testimony about Patricia Thompson's conduct was not corroborated, even though Ward claimed that nine or ten individuals were involved in Robert Williams' organization.

Fourth, Ward's testimony of this single occasion of illegal use of the properties is unambiguously denied by Patricia Thompson. Her defense is directly corroborated by the 41 complaint calls and by Robert Williams. That the appeals Court upheld the District Court's refusal to hear Williams only contributes to a definite and firm conviction that a grave miscarriage of justice has occurred in the forfeiture of Patricia Thompson's real properties and businesses.

As for the $7,791, the appeals court concluded that Thompson was not an innocent owner based on Ward's testimony of Thompson's role at the lounge *five years prior* to the seizure of the currency. This theory has no factual or logical nexus to Patricia Thompson's ownership of this currency when it was seized on May 2, 1991, even under the broad negligence standard discussed by this Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S. Ct. 2080, 2094-2095, 40 L. Ed. 2d 452 (1974).

This Court should exercise its supervisory power by granting certiorari to consider all of the evidence regarding innocent ownership, which demonstrates that Patricia Thompson met her burden under 19 U.S.C. § 1615.

II. In the alternative, 19 U.S.C. § 1615 is unconstitutional under the Fifth Amendment to the United States Constitution because it places the ultimate burden on Patricia Thompson of proving her innocence. Trial counsel recognized the practical difficulty of this burden in final summation in these cases:

> Judge, I understand the burden here is now for me to rebut their probable cause showing. And, quite candidly, we are in a difficult position in that in part we are forced to prove a negative, if you would, that certain things other people have testified happened in secret, on street corners, behind closed doors, never occurred and that's always a difficult job for anyone in any situation whatever type of lawsuit you might find yourself in.

This Court recognized in *Austin v. United States*, 509 U.S. _, 113 S. Ct. 2801, 2810-2812, 125 L. Ed. 2d 488 (1993) that the *in rem* statutory forfeiture provisions of 21 U.S.C. § 881 are punitive. Indeed, the fact that Section 881 provides an "innocent owner" defense only highlights the punitive aspect of this statute by focusing on the culpability of the owner. *Id.*

This punitive aspect of Title 21 forfeiture is relevant not only to the Eighth Amendment issue discussed below, but also to the procedural due process deficiencies of 19 U.S.C. § 1615. While this Court has held that the due process requirement of proving guilt beyond a reasonable doubt does not apply to civil forfeiture proceedings, *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 271-272, 24 L.Ed. 901 (1878), the Court also has recognized that "even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal." *Austin v. United States*, 113 S. Ct. at 2805 n. 4, *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) and *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742, *rehearing denied*, 448 U.S. 916, 65 L. Ed. 2d 1179, 101 S. Ct. 37 (1980).

Under the Eleventh Circuit's judgment in these cases,

Patricia Thompson will lose seven lots of real estate,[5] a restaurant, a liquor store, a liquor license and a lounge, as well as $7,791 in currency, for allegedly acting as a "lookout" when Ward and Williams prepared cocaine on one occasion in her lounge kitchen in 1986. The judgment of forfeiture is not only excessively harsh but also imposes a stigma of criminal culpability on Patricia Thompson. Additionally, these properties and businesses are her livelihood. Everything she has invested for the past ten years is lost if they are forfeited. For these reasons, the forfeiture prosecutions, selected by the Government as Patricia Thompson's punishment for her alleged minor culpability, require far greater procedural due process than that afforded by 19 U.S.C. § 1615.

What process is due? At a minimum, the Government should be required to shoulder the burden of proof at all times, by a standard greater than probable cause. Patricia Thompson should not be required to prove her innocence; rather, the Government should be obligated to prove its facilitation predicate for forfeiture of the real properties, or its proceeds predicate for forfeiture of the currency, by at least clear and convincing evidence.

This Court has imposed a clear and convincing evidence standard on the Government, in the interest of "fundamental fairness," in various civil settings in which the Government seeks to deprive individual of important rights. *See, e.g., Santosky v. Kramer,* 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599 (1982) (collecting cases on civil commitment, deportation and denaturalization). "The Court has deemed this level of

---

5. While the various complaints seek forfeiture of nine lots of real property, the Government stipulated at the conclusion of the trial to exclude lots 8 and 9, which had been erroneously included in the property description. This stipulation is not reflected in the District Court's final judgment of forfeiture. (App. B, 9a).

certainty [clear and convincing evidence] necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individuals involved with 'a significant deprivation of liberty' or 'stigma.'" *Id., quoting Addington v. Texas,* 441 U.S. 418, 425-426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The three-part test of *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), provides guidance on the burden and standard of proof required in these proceedings. This Court recently applied the *Mathews* test to a Section 881(a)(7) forfeiture in the context of preseizure notice and opportunity to be heard. *United States v. James Daniel Good Real Property,* 510 U.S. __, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). The *Good* opinion readily concluded that the private interest affected by the official action of forfeiture of real property is substantial. *Id.,* 114 S. Ct. at 503. Patricia Thompson enjoys significant rights of ownership in her business properties, as did Good, satisfying this first test under *Mathews.*

The second factor — risk of an erroneous deprivation of that private interest through the procedures used, and the probable value of additional safeguards — is apparent in these cases. Patricia Thompson is forced by 19 U.S.C. § 1615 to prove her innocence about an isolated event that allegedly occurred almost five years prior to the seizure of her properties. This burden is virtually insurmountable under the preponderance standard, creating an unconscionable risk of erroneous deprivation. If the burden was placed on the Government to prove its predicate under 21 U.S.C. §881(a)(7) by clear and convincing evidence, that risk would be substantially reduced. *See, e.g., United States v. $191,910.00 in United States Currency,* 16 F.3d 1051, 1069 (9th Cir. 1994), in which the Ninth Circuit notes the "serious risk that an innocent person will be deprived of his property" by Section 1615's disproportionate burden on the claimant.

Finally, the Government's interest does not override the procedures proposed. While the Government should have no general interest in forfeiting property, *United States v. James Daniel Good Real Property*, 114 S. Ct at 505, greater procedural due process is required because of the reality that Government has a real interest in the outcome — revenue from the forfeiture. *Id.*, 114 S. Ct. at 506 n.2 (recognizing the Government's financial stake in forfeiture and the concomitant need to scrutinize governmental action more closely in these proceedings). To deprive the Government of the easily-met probable cause standard and the shifting burden of Section 1615 will not adversely affect the Government or create substantial administrative burdens. The Government has far superior access to evidence than a claimant, far greater experience in the odd, quasi-criminal nature of *in rem* forfeitures than most civil or criminal litigators, and should be readily prepared to undertake the clear and convincing standard, given its experience with the reasonable doubt burden in criminal proceedings.

Historically, the federal courts have upheld the constitutionality of 19 U.S.C. § 1615, rejecting the argument that the burden of proof should not shift to the claimant but should remain on the Government. *See, e.g.*, D. Smith, *Prosecution and Defense of Forfeiture Cases* (1995), at pp. 4-120.15 n. 184, 11-34 n. 63 (collecting cases, including state court decisions rejecting the Section 1615 burden shift and lower federal court authorities that question the constitutionality of Section 1615). These cases predate *Austin* and do not address the Fifth Amendment issue under that decision's conclusion that *in rem* forfeiture is punitive. This proceeding presents that opportunity, and the Court should grant certiorari as the next logical step in its review of constitutional concerns of *in rem* forfeitures.[6]

---

6. A related issue regarding innocent ownership is pending before the Court in *Bennis v. State of Michigan*, No. 94-8729 (U.S. S. Ct. *cert. granted* June 5, 1995).

III. *Austin v. United States*,[7] decided after the trial of these cases, presents another constitutional concern that attends the extensive forfeitures in these consolidated cases. Patricia Thompson's counsel, in pleading her post-trial Motion to Take Additional Testimony, argued:

> Inasmuch as the subject property is the sole source of income for the claimant and her family; that she has paid all obligations on the property, through the operation of the business located at the subject property; that the government waited a number of years before bringing the above action; that her participation in any wrong doing, if any, was minimal; that there is a great disproportionate taking as compared to the claimant's involvement and her hard work to increase the value of the property; and that In the interest of justice and fairness, the claimant requests that the court take additional testimony.

(App. E, 29a). These concerns are amplified under the Eleventh Circuit's Opinion in these cases, in which forfeiture of Patricia Thompson's real properties and several businesses is predicated solely on the "facilitation" theory of 21 U.S.C. § 881(a)(7). The Court of Appeals explicitly relied on Robert Ward's testimony, and all of Thompson's business properties are to be forfeited because of the single act of criminal conduct that allegedly occurred in the kitchen of Patricia Thompson's business properties.

---

7. *See also Alexander v. United States*, _ U.S. _, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993) (applicability of Eighth Amendment to criminal *in personam* forfeiture).

Justice Scalia considered the Eighth Amendment problems of such a broad application of Title 21 forfeiture in *Austin:*

> Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense — the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.

Id., 113 S. Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment). While the *Austin* majority did not adopt the relationship between the forfeited property and the offense as the exclusive factor to consider in applying the Eighth Amendment to these types of forfeiture, that factor "may be relevant." *Id.,* 113 S. Ct. at 2812, n. 15.

Applying that test in the cases *sub judice,* it is apparent that the forfeiture of all of Patricia Thompson's business properties is grossly disproportionate to her culpability and bears no rational relationship to the actual illegal use of the properties in these cases. This consideration and other factors bearing on the excessive fine analysis merit this Court's grant of certiorari to either apply the Eighth Amendment to the facts of these cases or,

in the alternative, to remand these proceedings for further consideration of the issue by the lower Courts.

IV. Finally, this Court's decision in *United States v. James Daniel Good Real Property et al.*, 510 U.S. _, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) is applicable here. The United States identified Patricia Thompson in its original Complaint for forfeiture, filed contemporaneously with the Government's lis pendens notice and *ex parte* motion for a seizure warrant. No preseizure notice or opportunity for adversary or other hearing was accorded Patricia Thompson. Instead, her properties were seized by warrant and she was required by the United States Marshal to sign an occupancy agreement to maintain possession and use of her properties.

This is precisely the type of procedure that the *Good* Court found unconstitutional. The fact that Patricia Thompson's real properties and businesses are not residential makes no difference in assessing the constitutional impropriety of the seizure. *Id.*, 114 S. Ct. at 510. Some less intrusive means of seizure, such as the lis pendens notice also used by the Government, was sufficient to maintain the status quo until an adversary hearing was held to determine the propriety of these broad forfeiture actions. There were no exigent circumstances to sanction the lack of preseizure notice and adversary hearing. Under these circumstances, Patricia Thompson's right to procedural due process was violated.

Finally, while Thompson's properties were seized *ex parte* prior to this Court's ruling in *Good*, that decision should be applied retroactively to all cases such as this pending on direct review at the time *Good* was announced. *See, e.g., Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517, 125 L. Ed. 2d 74 (1993) ("when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of

federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991).

CONCLUSION

This Petition for Writ of Certiorari should be granted in the Court's exercise of its supervisory power to reverse the forfeitures resulting from the lower courts' departure from the accepted and usual course of judicial proceedings, to resolve important federal questions regarding the burden and standard of proof in Title 21 forfeitures, and to enforce this Court's prior rulings in *Austin* and *Good*.

DATED this 3rd day of October, 1995.

Respectfully submitted,

ROBERT S. GRISCTI
Counsel of Record
TURNER & GRISCTI, PA
Attorneys for Petitioner
204 West University Ave., Suite 6
Gainesville, FL 32601
(904) 375-4460

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 5, 1995

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3038
Non-Argument Calendar

D. C. Docket No. 91-105-Civ-FTM-21D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

3210 MARTIN LUTHER KING JR. BLVD.,

Defendant,

PATRICIA THOMPSON,

Claimant-Appellant,

DAVID F. DAVIS; DICK STEELE, Tax collector of Lee County, Florida,

Claimants,

LEE COUNTY TAX COLLECTOR,

Claimant-Appellee.

Appendix A

Appeal from the United States District Court
For the Middle District of Florida

(July 5, 1995)

Before HATCHETT, ANDERSON and CARNES, Circuit Judges.

PER CURIAM:

Appellant, Patricia Thompson, appeals the district court's order forfeiting property to the government and denying her claim to that property as an innocent owner. We affirm.

BACKGROUND

During 1990 and 1991, activities in and around the Inner Circle Lounge (the Lounge), a nightclub/liquor store/restaurant, resulted in several narcotics-related convictions. On May 2, 1991, the government filed a complaint seeking forfeiture of the Lounge. The government also sought forfeiture of $7,791 seized from the Lounge. Agents executing a search warrant found this money in various locations of the Lounge, including inside an icebox and paper bags. Thompson subsequently filed a claim of ownership in the forfeiture action.

The district court held a bench trial. At trial, the government presented, among other evidence, the testimony of Robert Lee Ward. Ward stated that the Lounge was used to cook cocaine. Ward further testified that Thompson was aware of this activity, and had even served as a lookout while others cooked the cocaine.

On September 13, 1993, the district court entered written

findings of fact and conclusions of law determining that the government had established probable cause for the forfeitures and that Thompson had failed to establish an innocent owner defense. The district court, however, did not enter a final order of forfeiture. On January 26, 1994, Thompson filed a motion to take additional testimony. On June 24, 1994, the district court denied her motion. On July 18, 1994, the district court entered a final order of forfeiture.

ISSUES

This appeal requires us to address the following issues: (1) whether the district court erred in finding that Thompson was not an innocent owner of the Lounge; (2) whether the district court erred in finding that the government had established probable cause for the forfeiture of the $7,791, and in finding that Thompson was not an innocent owner of the money; and (3) whether the district court abused its discretion in denying Thompson's motion to take additional testimony.

DISCUSSION

A. The Lounge

Thompson does not contend that the government failed to establish probable cause for the forfeiture of the Lounge. Instead, she only argues that she is an innocent owner.

In order to establish an innocent owner defense, Thompson must show that the narcotics-related activity at the Lounge was committed without her "knowledge or consent." 21 U.S.C. § 881(a)(7). The district court found that "Thompson knew of the illegal cocaine preparation which occurred in the kitchen of her

Lounge. In several instances, she participated in this activity by serving as a lookout." Because Ward's testimony supported this finding, the district court did not clearly err in concluding that Thompson knew of, and assisted in, the narcotics-related activity. As a result, we reject Thompson's innocent owner argument.

B. The $7,791

Thompson claims that the government did not establish the required probable cause for the forfeiture of the $7,791. "To demonstrate probable cause for forfeiture under 21 U.S.C. § 881(a)(6), the government must present evidence furnishing a 'reasonable ground for belief' that a substantial connection exists between the [money] to be forfeited and an illegal exchange of a controlled substance." *United States v. $121,000 in United States Currency,* 999 F.2d 1503, 1506 (11th Cir. 1993). We recognize that "a large amount of currency, in and of itself, is insufficient to establish probable cause for forfeiture under 21 U.S.C. § 881(a)(6)." *$121 in United States Currency,* 999 F.2d at 1507. We also recognize that it is not unusual to find a sum of cash totaling $7,791 at a business premises such as the Lounge.

Nonetheless, "[t]he government need not connect the defendant currency to any particular drug transaction. Nor must the evidence point to drugs to the exclusion of all other theories." *$121,000 in United States Currency,* 999 F.2d at 1508 (citations omitted). In this case, the money was found in unusual locations, such as inside an icebox and paper bags. Ample evidence also showed that the Lounge was a center of narcotics-related activity. Given the unusual locations of the money at a center of drug activity, "we conclude that, under the totality of the circumstances, probable cause existed for the forfeiture in this case." *$121,000 in United States Currency,* 999 F.2d at 1507.

Finally, Thompson again contends that she is an innocent owner of the money; however, as has already been stated, Thompson is not an innocent owner.

C. The Motion to Take Additional Testimony

After the district court entered its findings of facts and conclusions of law, but before it entered a final judgment, Thompson filed a "motion to take additional testimony." * Since the district court had "provided the parties with an indication of its ruling," it treated Thompson's motion as one "for a new trial on the ground of newly discovered evidence under Rule 59, Federal Rules of Civil Procedure." The district court denied the motion because it found that the evidence that Thompson sought to present was not newly discovered and could "have been presented at the trial by an exercise of due diligence."

Thompson appears to contend that the district court should have considered her motion as a rule 52 motion, as opposed to a rule 59 motion. Whether Thompson's motion is considered to be a rule 52 or a rule 59 motion, we will only disturb the district court's decision if it constitutes an abuse of discretion. *See Trigo v. Federal Deposit Ins. Corp.*, 847 F.2d 1499, 1504 (11th Cir. 1988) (finding district court did not abuse its discretion in denying motion "under Rules 52 and 59"). The district court denied Thompson's motion because the additional testimony that she sought to produce was available to her during trial. This reasoning does not constitute an abuse of discretion. *See Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) (rule 52 should not "be employed to introduce evidence

* Thompson claims that this additional evidence would have established, among other things, that Ward presented untruthful testimony and that she did not engage in drug activity.

that was available at trial but was not proffered"); *National Labor Relations Bd. v. Jacob E. Decker and Sons,* 569 F.2d 357, 363 (5th Cir. 1978) (same for rule 59).

CONCLUSION

For the foregoing reasons, we affirm the district court.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION FILED JULY 18, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

V.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR., BLVD., FORT MYERS, LEE COUNTY, FLORIDA 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, AND MORE PARTICULARLY DESCRIBED AS, TO WIT:

Lots 1 through 9, inclusive, Block A, Carver Park Subdivision, as per plat or map thereof recorded in Plat Book 8, at pages 87 and 88, public records of Lee County, Florida, including

LIQUOR LICENSE NUMBER 46-00013SR
applicable thereto exclusively,

Defendants

and

Appendix B

CASE NO. 92-88-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

V.

$7,791.00 IN UNITED STATES CURRENCY,

Defendant

ORDER

On September 13, 1993, the Court entered an Order (Dkt. #79), finding Defendants liquor license, real property, and currency subject to forfeiture. The Court indicated in that Order that it would enter a separate order of forfeiture, following the resolution of issues concerning a claim of the Lee County Tax Collector for *ad valorem* real property taxes on the property.

On June 8, 1994, the Court held a hearing in which Plaintiff, Claimant Thompson, and Claimant Lee County participated. At the hearing, Claimant Thompson, through her counsel, failed to persuade the Court that the Lee County Tax Collector's lien was in any manner invalid. Additionally, Claimant Lee County and Plaintiff indicated to the Court that they would file a stipulation concerning Lee County's interest in the real property. The Lee County Tax Collector and Plaintiff have filed herein their Stipulation (Dkt. #108) and a proposed order, in which Plaintiff agrees to recognize a priority lien on Defendant real property for *ad valorem* taxes owed to Lee County. Accordingly, it is hereby ORDERED and ADJUDGED that:

Appendix B

1. Defendant real property, located at 3210 Martin Luther King, Jr. Blvd., Fort Myers, Lee County, Florida 33916, together with all improvements, fixtures and appurtenances thereto, and more particularly described as:

> Lots 1 through 9, inclusive, Block A, Carver Park Subdivision, as per plat or map thereof recorded in Plat Book 8, at pages 87 and 88, public records of Lee County, Florida,

along with Liquor License Number 46-00013SR and $7,791.00 in currency are FORFEITED to the United States for disposition by the United States Marshal's Service pursuant to law.

2. Title to Defendant real property vested in the United States on September 29, 1986.

3. The annual lien for unpaid real property *ad valorem* taxes, plus interest at eighteen percent (18%) per year, figured monthly, from April 1 of the calendar year following the calendar year for which the tax lien accrues, be and is hereby recognized as a first priority lien in the real property forfeited, subject only to the United States Marshal's expenses of sale.

4. Such lien or liens shall be recognized as having accrued in their full amount as of January 1 of each year through and including the calendar year in which the order of forfeiture becomes final.

5. No lien for *ad valorem* real property tax shall be recognized in such property for any calendar year after the calendar year in which the order of forfeiture becomes final. However, this Court specifically authorizes appropriate Lee

County officials, presently the Lee County Property Appraiser, to include the property on the taxable portion of the tax roll in the year of sale for the period during which ownership of the property is not vested in Plaintiff, if such inclusion is authorized by Florida law.

6. Upon transfer or sale of Defendant real property to a taxable entity, the liens for *ad valorem* taxes and accrued interest shall be satisfied after payment of the United States Marshal's expenses of sale and before any other interest in the subject property.

7. Such liens for *ad valorem* tax and interest shall not include attorneys' fees or costs incurred by the Lee County Tax Collector in this action, such claims for fees and costs having been withdrawn or waived.

DONE AND ORDERED, at Tampa, Florida, this 18th day of July, 1994.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION FILED SEPTEMBER 13, 1993

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

V.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, AND MORE PARTICULARLY DESCRIBED AS, TO WIT:

Lots 1 through 9, inclusive, Block A, Carver Park Subdivision, as per plat or map thereof recorded in Plat Book 8, at pages 87 and 88, public records of Lee County, Florida, including

LIQUOR LICENSE NUMBER 46-00013SR applicable thereto exclusively,

Defendants

and

Appendix C

CASE NO. 92-88-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

V.

$7791.00 IN UNITED STATES CURRENCY,

Defendants

In this action Plaintiff United States seeks forfeiture of the above-described real property, a liquor license, and $7,791.00 in United States currency. Claimant Patricia Thompson is the current owner of Defendant real property in this action. The government's forfeiture cases against Defendant real property, liquor license and currency were consolidated and tried to the Court sitting without a jury. Upon due consideration of the testimony and evidence presented, the arguments of counsel, and the proposed findings submitted by the parties, the Court issues the following opinion as its findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Defendant real property consists of a nightclub, liquor store, and restaurant. The property, originally called the Golden Spirit, subsequently became known as the Innercircle Lounge (the "Lounge"). The Lounge was originally built by Pat McCutcheon. Ownership of the Lounge and liquor license was placed in the name of Club 21 of Fort Myers, Inc. ("Club 21"), a Florida corporation.

Appendix C

In 1979, Dora Fletcher purchased the Lounge from McCutcheon and executed a note and mortgage in his favor. By 1986, Fletcher wanted to sell the lounge. That year, she entered into negotiations with Robert Nash Williams for a potential purchase of the Lounge. Williams is the brother of Claimant Thompson. At a first meeting, Fletcher proposed an asking price of $300,000.00, and Williams rejected this offer. However, during a subsequent encounter Williams and Fletcher reached an agreement. Williams proposed to pay Fletcher $100,000.00 in cash, to give her a $100,000.00 mortgage and note payable without interest, and to pay off the existing debts of the business which totalled slightly more than $70,000.00. Williams made it clear to Fletcher that the transaction was to be done in the name of his sister, Claimant Thompson.

Shortly thereafter, Fletcher met with Thompson to complete the details of the transaction. Thompson opened an account at Southeast Bank with a deposit of $8500.00 Drawing upon this account, Thompson wrote two checks to Fletcher in the total amount of $8000.00[1]

Fletcher and Thompson then met with Deborah Martin, an investigator with the Division of Alcoholic Beverages and tobacco, to submit an application for a change of officers for Club 21. Thompson told Martin that she was purchasing the Lounge for $130,000.00. Fletcher concurred with this statement. Fletcher and Thompson then provided Martin with information to establish Thompson's source of funding for the purchase. Fletcher first produced the $100,000.00 note executed in her

1. Thompson made several more minimal payments from this bank account and closed it approximately one year later.

favor. Next, Thompson produced a promissory note for $22,000.00, executed in favor of McCutcheon.[2]

Martin then inquired as to the source of the remaining $8,000.00, and Thompson replied that the money would come from the business account of a grocery store owned by she and her husband. Martin indicated that Thompson would need to verify the source of this remaining $8,000.00. Shortly after the meeting, Thompson called Martin and advised her that the $8,000.00 would come not from the grocery store account, but from money that she had saved over several years from her employment and through Tupperware sales. Martin testified that throughout the meeting, Thompson was unsure of her answers, and that Fletcher helped Thompson with responses to questioning.

Following the meeting with Martin, Fletcher and Thompson went to the office of an attorney to close the transaction. The attorney, however, refused to perform the closing. Fletcher then sought out a second attorney. She told the second attorney about the $100,000.00 note and mortgage as payment for the Lounge, but did not tell him about the $100,000.00 cash payment or the agreement to pay off the $70,000.00 debt. The attorney suggested that 8% interest be included on the note, as the IRS might impute interest. Fletcher agreed, and the attorney closed the transaction on September 29, 1986. In the transaction Claimant Thompson acquired the stock of Club 21, became president of the corporation, and took a mortgage deed to the real property. Williams thereafter delivered $92,000.00 in cash to Fletcher at her home. This amount reflected the $100,000.00 cash promised, less $8,000.00 for 8% interest added to the note.

---

2. McCutcheon testified that he never intended to actually provide an unsecured loan for Thompson.

Appendix C

At trial, Williams' son, Robert Lee Ward, testified regarding the use of the Lounge. Ward indicated at trial that he first met his father when he was about 17 years old, and that Williams recruited him into his crack distribution organization as a courier shortly thereafter Ward stated that Williams' group obtained cocaine powder in Fort Lauderdale, Florida, transported it to Fort Myers, Florida, cooked the cocaine into crack, and distributed it in Fort Myers. Ward indicated that Williams' group consisted of approximately ten individuals including claimant Thompson's husband, Clarence Thompson. The organization transported up to five kilograms of cocaine per day from 1985 until 1991, when Williams was arrested. According to Ward, Clarence Thompson rented an average of two cars per week from 1985 to 1991 to transport the organization's drugs and currency.

Ward testified that Williams intended to purchase the Lounge but would allow his sister and her husband to run the business. Ward stated that Williams used the Lounge to cook cocaine, to store cocaine, and to store cash from cocaine sales. Ward testified that the Claimant Thompson was aware of these activities and had, in fact, served as a lookout while others cooked cocaine and counted money. Ward also testified that he had delivered cocaine and cash to Thompson's home, and that Thompson had served as a lookout while cocaine was cooked into crack at her home.

Lee County Sheriff's Deputy Wyatt Walker testified for the government regarding drug-related activities at the Lounge. He indicated that during 1990 and 1991 activities in and around the Lounge resulted in five narcotics related convictions. Deputy Walker also testified regarding the events precipitating this action. On May 2, 1991, agents of the Drug Enforcement Administration and the Internal Revenue Service executed a

search warrant at the Lounge. Agents discovered the $7,791.00 in currency in various locations throughout the Lounge. The Government then initiated this action for forfeiture of the currency discovered in the search, Claimant's Lounge and the liquor license.

Plaintiff also presented Agent Calvin Boyer, Jr. of the Criminal Investigation Division of the Internal Revenue Service to testify regarding the financial status of Claimant Thompson and her husband and their ability to purchase the Lounge. Boyer reviewed the Thompsons' tax returns from 1984 to 1986. These returns revealed that the Thompsons claimed exemptions for their six dependents and had resulting joint taxable income in the following amounts: $7704.00 in 1984; $3198.00 in 1985; and $1497.00 in 1986. Additionally Clarence Thompson received an insurance settlement of $12,540.00 in 1976, paid over a five year period, and worker's compensation payments of approximately $27,774.00 during the 1980s. Claimant Thompson further borrowed approximately $11,000.00 from her father for necessary living expenses of her family. Nonetheless, evidence indicates that Clarence Thompson purchased a 1986 Ford van for $18,000.00 cash in December of 1985.

Based on this financial information, Boyer found it unlikely that the Thompsons could maintain even their lower income standard of living and also save the $8,000.00 payment for the Lounge. Boyer testified that in comparison, an investigation of Williams' financial status revealed that Williams had a large amount of disposable cash. Williams spent a total of $359,662.00 during 1986 and his expenditures included the purchase of a Mercedes-Benz with $54,000.00 currency.

Appendix C

CONCLUSIONS OF LAW

Title 21 U.S.C. § 881 governs the forfeiture of property in this action. Section 881(a)(6) provides for the forfeiture of moneys given in an illegal exchange for a controlled substance and proceeds traceable to such an exchange.[3] Section 881(a)(7) provides for the forfeiture of real property used to commit or facilitate acts in violation of the Drug Abuse Prevention and Control Act.[4]

A Section 881 forfeiture proceeding follows a well established procedure. First, a claimant must establish standing as an owner of the property at issue. *United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, 963 F.2d 1496, 1500 (11th Cir. 1992). Plaintiff does not contest that Claimant has standing in this case as president of the corporate owner of the Lounge.

---

3. Section 881(a)(6) provides that: "All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

4. Section 880(a)(7) provides that "All real property, including any right, title and interest (including any leasehhold interest) in the whole of any lot or tract of land and any appurtenance of improvement, which is used, or intended to be used in any manner or part, to commit, or to facilitate the commission of a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner."

Appendix C

Once a claimant establishes standing, the burden shifts to the government to prove probable cause for instituting the forfeiture action. *Id.* (citing Title 19 U.S.C. § 1615). The trial court must determine whether the government has met its burden. *Id.* at 1501. At the close of Plaintiff United States' case, the Court found that Plaintiff met its burden of establishing probable cause with respect to the currency, real property and license.

The next procedural step requires the claimant to prove by a preponderance of the evidence a defense to the forfeiture. *Id.; United States v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida,* 933 F.2d 976, 979 (11th Cir. 1991). One such defense is the "innocent owner" defense, contained within Section 881(a)(6) and Section 881(a)(7). An owner can successfully avoid forfeiture under Section 881(a)(7) by proving that she had no knowledge of the illegal activity occurring on her property or did not consent to that activity. 21 U.S.C. § 881(a)(7); *1012 Germantown Road,* 963 F.2d at 1503. An owner can likewise defend a forfeiture action under Section 881(a)(6) by proving lack of knowledge or consent. 21 U.S.C. § 881(a)(6). An owner meets this burden by rebutting the government's evidence that the property was purchased with proceeds of illegal drug activities, or that he did not know of the property's connection with drug sales. *15603 85th Avenue,* 933 F.2d at 979. However, the innocent owner defense will not protect a claimant who at any time prior to the initiation of the forfeiture proceeding has knowledge that his legitimate funds were commingled with funds derived from drug activities for the purchase of the real property in question. *See id.* at 982. In the forfeiture action, the fact finder bears the responsibility of determining whether a claimant has sufficiently established the innocent owner defense. *Id.; United States v. Certain Real and Personal Property Belonging to Hayes,* 943 F.2d 1292, 1296 (11th Cir. 1991).

Appendix C

Claimant Thompson asserts that she had no knowledge of the activity occurring at the Lounge. She maintains that her brother was not involved in the purchase of the Lounge and that she was unaware of any consideration paid to Fletcher other than her $8,000.00 payment and the $100,000.00 note. She further states that she had no knowledge of any illegal cocaine activity occurring at the Lounge.

After considering the evidence and the testimony of the various witnesses presented at trial, the Court concludes that Claimant Thompson has failed to satisfy her burden to prove a defense to the forfeiture. Evidence indicates that Claimant Thompson knew of the illegal cocaine preparation which occurred in the kitchen of her Lounge. In several instances, she participated in this activity by serving as a lookout.

Additionally, the evidence establishes that the Lounge was purchased with proceeds from illegal drug activities. A review of Claimant Thompson's financial status indicates that she had minimal income and could not likely save $8,000.00 to pay for the Lounge. Thompson also expressed confusion and uncertainty regarding the source of the $8,000.00 to Division of Alcoholic Beverages and Tobacco investigator Martin. Thompson further opened a bank account with $8,000.00 cash to make a payment to Fletcher for the Lounge, then closed that account approximately one year later. In contrast, Thompson's brother, Robert Nash Williams, had access to a large amount of currency obtained through drug-related activities. He directly initiated and negotiated the purchase of the Lounge, and he paid $22,000 cash to Fletcher. Williams further indicated that he would complete the transaction using his sister's name. The Court concludes from this evidence that Williams contributed funds used to purchase the Lounge and that Claimant Thompson had knowledge of his contributions.

Based on the foregoing, the liquor license, the Lounge and the currency contained therein are subject to forfeiture to Plaintiff United States. *See 1012 Germantown Road,* 963 F.2d 1496; *15603 85th Avenue,* 933 F.2d 976. Pursuant to Section 881(h), "all right, title and interest in property . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section." Title therefore vested in the United States on September 29, 1986, the date on which Claimant purchased the Lounge with proceeds from illegal drug activity. At the close of the evidence in this case, Plaintiff agreed that Lots eight and nine were erroneously included in the legal description of the property sought to be forfeited, and it was therefore stipulated that the description of the real property would be amended accordingly.

Lastly, the Lee County Tax Collector made an appearance at trial to assert a claim against Defendant property. Apparently, Claimant Thompson paid *ad valorem* real property tax to Lee County from 1986 until the time of trial, in the amount of $19,350.33. Lee County also asserts a lien for unpaid 1992 and 1993 property taxes. Ordinarily, a state cannot constitutionally levy a tax against the United States government without the consent of Congress. *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176 (1989). If the United States retroactively becomes the owner of Defendant property on September 29, 1986 pursuant to Section 881(h), than real property taxes have been unlawfully assessed against it. Lee County, however, argues that it may assert a claim against the property because it falls within the innocent owner exception to Section 881's forfeiture provisions.[5]

---

5. Claimant Lee County and Plaintiff United States filed a Stipulation (Dkt. #32) in this action indicating that the United States would escrow monies received from a sale of the subject property for a period of 120 days from the date of an order of forfeiture sufficient to satisfy the full claim of Lee County. The parties anticipated that Congress would pass legislation that would amend the federal (Cont'd)

Appendix C

This month the Eleventh Circuit issued an opinion which addressed an issue similar to that presented by the facts of this case. In *United States v. Single Family Residence Located at 3181 S.W. 138th Place, Miami, Florida*, 996 F.2d 1141 (11th Cir. 1993), the Dade County Tax Collector alleged an interest in unpaid *ad valorem* real property taxes on forfeited property due but not paid up to the time of forfeiture. Dade County asserted that it was an innocent owner of these taxes due, pursuant to Section 881(a)(6). The Eleventh Circuit indicated that based on the recent Supreme Court case of *United States v. 92 Buena Vista Ave.*, __ U.S. __, 113 S.Ct. 1126 (1993), it would apply the innocent owner exception to forfeiture, set forth in Section 881(a)(6), before applying the retroactivity provision in Section 881(h). *Id.* at 1143. Accordingly, the tax collector would have the opportunity to prove itself an innocent owner of unpaid taxes and assert a claim against the property before the Court issued a final order of forfeiture.

At trial, the parties to this action did not present evidence regarding the status of Lee County as an innocent owner of paid and unpaid real property taxes. Given the Eleventh Circuit's recent ruling, the Court will give Plaintiff and Lee County 20 days in which to inform the Court either that they have reached an agreement regarding Lee County's interest in paid an unpaid

---

(Cont'd)
forfeiture laws to retroactively exempt state and local governments from the application of Section 881(h). The stipulation provides that such legislation does not become effective within 120 days from the date of any final order of forfeiture. The United States Marshals Service must dispose of the property, including the escrowed monies, pursuant to forfeiture laws currently in effect. Lee County subsequently filed a Motion for Relief from Stipulation (Dkt. #73). The Court GRANTS Lee County's Motion and will base its ruling on current case law and statutory law.

property taxes, or that it is necessary to hold an additional hearing on these issues.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that:

1. Plaintiff and Claimant Lee County have 20 days from the date of this Order within which to inform the Court either that they have reached an agreement regarding Claimant Lee County's interest in Defendant real property or that a hearing is necessary.

2. The Court will enter a separate order of forfeiture in accordance with the foregoing discussion, following a resolution of Lee County's claim.

DONE AND ORDERED, at Tampa, Florida, this 13th day of September, 1993.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION FILED JUNE 24, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

V.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, AND MORE PARTICULARLY DESCRIBED AS, TO WIT:

Lots 1 through 9, inclusive, Block A, Carver Park Subdivision, as per plat or map thereof recorded in Plat Book 8, at pages 87 and 88, public records of Lee County, Florida, including

LIQUOR LICENSE NUMBER 46-00013SR applicable thereto exclusively,

Defendants

and

CASE NO. 92-88-CIV-FTM-21D

UNITED STATES OF AMERICA

Plaintiff

Appendix D

V.

$7791.00 IN UNITED STATES CURRENCY,

Defendants

This cause came before the Court for a hearing on June 8, 1994 to address the issue of Claimant Lee County's interest in paid and unpaid *ad valorem* real property taxes on property which the Court found subject to forfeiture. The Court permitted Claimant Patricia Thompson to participate in the hearing through her attorney.

At the hearing, Plaintiff and Claimant Lee County announced to the Court that they had reached an agreement regarding Lee County's interest in the taxes, in which Plaintiff would recognize the lien for taxes during those years up to the date when the Court enters its order of forfeiture. These parties further indicated that they would file a submission setting forth their agreement, to permit the Court to incorporate such agreement into its final order of forfeiture. The Court has not yet received this submission.

At the hearing, counsel for Claimant Thompson also presented argument regarding Lee County's interest in real property taxes. Claimant Thompson has asserted that Lee County does not have a valid lien for the taxes because it is not an "innocent owner" of the interest, pursuant to 21 U.S.C. § 881(a). Claimant Thompson asks the Court to impute to the Lee County Tax Collector, knowledge regarding illegal activity at the property which was known to the Lee County Sheriff's Department. The Court cannot make such an inference, as the Lee County Tax Collector is a constitutional officer of the State of

Florida which is separate and independent from the Lee County Sheriff's Office. Accordingly, the Court concludes that the Lee County Tax Collector is an innocent owner of its interest in the property.

Claimant Thompson further argued at the hearing that she is entitled to a refund of *ad valorem* taxes which she paid on the property from the date on which title to the property will retroactively vest in the United States, to present. Claimant Thompson's argument was premised upon the assumption that Lee County could assert no valid lien on the property against the United States. Claimant reasoned that if no taxes could be imposed on the property, she should not have been required to pay such taxes. However, as Plaintiff and Claimant Lee County have recognized, the innocent owner exception permits Lee County to retain its lien on the property despite the fact that title retroactively vests in the United States. *United States v. 2350 N.W. 187 Street,* 996 F.2d 1141 (11th Cir. 1993). Accordingly, taxes were due on the property. Claimant Thompson, by paying these taxes, recognized the validity of the lien. *See* Fla.Stat. § 197.122(1) ("All owners of property shall be held to know that taxes are due and payable annually"). Additionally, Claimant Thompson entered an Occupancy Agreement with the United States Marshals Service in May of 1991, in which she expressly agreed to make all tax payments as a condition of her remaining on the property. For these reasons, the Court finds that Claimant Thompson is not entitled to a refund of *ad valorem* taxes which she paid on the subject property.

Lastly, at the hearing, the Court heard argument on Claimant Thompson's Motion to Take Additional Testimony (Dkt. #101). Claimant Thompson asserts that she should be permitted to take additional testimony "in the interest of justice and fairness" and

to permit her to establish that she had no participation in the illegal activities which occurred at the subject property. Rule 52(b), Federal Rules of Civil Procedure, provides that "upon motion of a party made no later than ten days after entry of judgment the Court may amend its findings or make additional findings and may amend the judgment accordingly." When such a motion is made prior to the time when a court enters final judgment, the court construes the motion as one to take additional testimony and to render a final decision based on all testimony presented. *Pinto v. Philadelphia Fresh Food Terminal Corp.*, 1989 WL 234516 (E.D.Pa. 1989) (not reported) (citing 6 A.J. Moore Federal Practice P. 59-36). If a Court has provided the parties with an indication of its ruling, a motion to take additional testimony closely approaches a motion for a new trial on the ground of newly discovered evidence under Rule 59, Federal Rules of Civil Procedure, and the court may evaluate the motion under standards applicable to Rule 59.

Because the Court has entered an Order indicating its intent to enter an order of forfeiture, the Court will evaluate Claimant Thompson's Motion under Rule 59 standards. Upon a review of Claimant Thompson's submissions, there is no indication that the proposed testimony of her witnesses is "newly discovered," and that their testimony could not have been presented at the trial by an exercise of due diligence. *See National Labor Relations Board v. Jacob E. Decker and Sons*, 569 F.2d 357, 363 (5th Cir. 1978) (finding that newly discovered evidence must be evidence in existence of which a party was excusably ignorant, discovered after trial.); *Raulerson v. Wainwright*, 588 F.Supp. 381, 385 (M.D.Fla. 1980). Accordingly, the Court finds it inappropriate to accept Claimant Thompson's additional proposed testimony.

Accordingly, it is hereby ORDERED and ADJUDGED that:

Appendix D

1. Claimant Thompson's Motion to Take Additional Testimony (Dkt. #101) is DENIED.

2. Plaintiff and Claimant Lee County Tax Collector are DIRECTED to submit to the Court, on or before July 13, 1994, their proposed agreement regarding the validity of *ad valorem* real property tax liens, to permit the Court to incorporate such agreement into its forthcoming final order of forfeiture. In such submission, these parties shall also set forth the date on which title to the subject property will retroactively vest in the United States.

DONE AND ORDERED, at Tampa, Florida, this 24th day of June, 1994.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

APPENDIX E — MOTION TO TAKE ADDITIONAL TESTIMONY WITH EXHIBITS DATED JANUARY 26, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 91-105CIV-FTM-21(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA, 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, ETC.

Defendants.

and

Case No. 92-88CIV-FTM-10(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

$7,791.00 IN UNITED STATES CURRENCY,

Defendant.

Appendix E

MOTION TO TAKE ADDITIONAL TESTIMONY

COMES NOW, the Claimant, Patricia Thompson, by and through the undersigned counsel, and files this Motion to Take Additional Testimony, and as grounds, would show:

1. A trial ensued on the complaint of the United States of America, Plaintiff, wherein the Plaintiff brought forth witnesses, two of which were: Dora Fletcher and Robert Lee Ward.

2. It appears from the Court's non-final order on September 13, 1993, these two witnesses were the primary evidence supporting the Plaintiff's claim.

3. At trial, the Claimant's counsel did not present rebuttal witnesses who were mentioned by the Plaintiff's primary witnesses: Robert Nash Williams and Clarence Thompson.

4. At trial, evidence was introduced by the Plaintiff which alleged that drug activity was being conducted at the subject property. Again, the claimant's counsel did not present rebuttal witnesses at trial to the allegations.

5. Inasmuch as the subject property is the sole source of income for the claimant and her family; that she has paid all obligations on the property, through the operation of the business located at the subject property; that the government waited a number of years before bringing the above action; that her participation in any wrong doing, if any, was minimal: that there is a great disproportionate taking as compared to the claimant's involvement and her hard work to increase the value of the property; and that in the interest of justice and fairness, the claimant requests that the court take additional testimony.

Appendix E

6. The Claimant has acquired affidavits (attached as Exhibit A through C) which would tend to rebut the testimony of the Plaintiff's case in chief.

7. It is be the intent of the Claimant to call additional witnesses who can testify to: (1) that the reputation of Robert Lee Ward in the community is that he is a liar and is a drug dealer; (2) that employees of the club 21 have not seen drug activity by the Claimant nor her husband; and (3) the mortgage which was provided to Claimant was done so for a legitimate business purpose.

WHEREFORE, the Claimant respectfully requests this Honorable Court to grant Claimant's motion to provide additional testimony on her behalf.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 26 day of January, 1994, to: Robert P. Barclift, 2000 Main Street, Suite 701, Ft. Myers, FL 33901 and John O. Terry, PO Box 850, Ft. Myers, FL 33901.

Michael P. Reiter
Attorney for Claimant
PO Box 3421
N. Ft. Myers, FL 33918
(813) 283-9717
by s/ Michael Reiter
Michael Reiter
FL Bar #0320234

Appendix E

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105CIV-FTM-21(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA, 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, ETC.

Defendants.

and

CASE NO. 92-88CIV-FTM-10(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

$7,791.00 IN UNITED STATES CURRENCY,

Defendant.

Appendix E

AFFIDAVIT

BEFORE ME personally appeared Richard Padgett, and being *personally known* to me or has provided identification of ____, and who after being duly sworn deposes and says:

1. My name and address are Richard Padgett, 6361 Presidential Court, Ft. Myers, FL 33919.

2. I have been Patricia Thompson's accountant for a number of years and have done her business and personal tax returns.

3. Based upon my observation of her financial records, nothing appears out of the ordinary in the operation of club 21. The income and expenses appear to be typical to that type of establishment.

4. Based upon her tax returns it appears that club 21 is the primary source of income.

FURTHER THE AFFIANT SAYETH NOT.

s/ Richard Padgett
RICHARD PADGETT

STATE OF FLORIDA:
COUNTY OF LEE:

SWORN TO AND SUBSCRIBED before me this 17th day of December 1993, in County and State aforesaid.

s/ Dermod Saunders
Notary Public

Appendix E

Dermod Saunders
Printed Name
my commission expires 9/28/97

Appendix E

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105CIV-FTM-21(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA, 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, ETC.

Defendants.

and

CASE NO. 92-88CIV-FTM-10(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

$7,791.00 IN UNITED STATES CURRENCY,

Defendant.

Appendix E

AFFIDAVIT

BEFORE ME personally appeared Clarence Thompson, and being personally known to me or has provided identification of *personally known,* and who after being duly sworn deposes and says:

1. My name and address are Clarence Thompson, 2524 Henderson Ave., Ft. Myers, FL 33916.

2. I am Patricia Thompson's husband.

3. I have worked in club 21 since the day it opened. At not time have I seen or been aware of any involvement of Patricia Thompson in drugs either in or out of club 21.

4. I have not been involved with Robert Williams or anyone else regarding drugs.

5. I personally know Robert Lee Ward, and he has never been in the kitchen of club 21 nor ever been in or at Patricia Thompson's or my residence.

6. That I, Patricia Thompson, or an employee have called Law Enforcement on a number of accessions when we had suspicion of a crime at club 21.

7. To my knowledge, Robert Williams had noting to do with the purchase of club 21.

8. Club 21 is the only means of income of Patricia Thompson and she has operated that business for the past seven years in a legal fashion.

Appendix E

9. To my knowledge, Patricia Thompson has never been involved in any drug activity nor had any knowledge of any drug activity.

FURTHER THE AFFIANT SAYETHH NOT.

s/ Clarence E. Thompson
CLARENCE THOMPSON

STATE OF FLORIDA:
COUNTY OF LEE:

SWORN TO AND SUBSCRIBED before me this 9th day of Dec. 1993, in County and State aforesaid.

s/ Michael Reiter
Notary Public

Michael Reiter
Printed Name
my commission expires
6-24-94

Appendix E

EXHIBIT C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 91-105CIV-FTM-21(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR. BLVD., FORT MYERS, LEE COUNTY, FLORIDA, 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, ETC.

Defendants.

and

CASE NO. 92-88CIV-FTM-10(D)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

$7,791.00 IN UNITED STATES CURRENCY,

Defendant.

Appendix E

AFFIDAVIT

BEFORE ME personally appeared Robert Williams, and being personally known to me or has provided identification of ___, and who after being duly sworn deposes and says:

1. My name and address are Robert Williams, Box RMB 1000, Delta Unit, Talladeger, AL 35160-8799.

2. I am Patricia Thompson's brother.

3. I did not purchase club 21. I did not make arrangements for Patricia Thompson to purchase club 21. I did not make any agreements with Ms. Fletcher nor give Ms. Fletcher any money.

4. Patricia Thompson, to my knowledge, has never been involved in drug activity, nor has she expressed to me any knowledge of any drug activity.

5. Clarence Thompson, to my knowledge, has never been involved in any drug activity, nor has he ever expressed to me any knowledge of any drug activity.

FURTHER THE AFFIANT SAYETHH NOT.

s/ Robert Williams
ROBERT WILLIAMS

STATE OF ALABAMA:
COUNTY OF TALLADEGA

SWORN TO AND SUBSCRIBED before me this 16th day of December 1993, in County and State aforesaid.

s/ Rickey W. Daniel
Rickey W. Daniel, Notary
My Commission Expires
08-10-94

APPENDIX F — WARRANT OF ARREST IN REM FILED MAY 2, 1991

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No: 91-105-Civ-FtM-98D

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY LOCATED AT 3210 MARTIN LUTHER KING, JR., BLVD., FORT MYERS, LEE COUNTY, FLORIDA 33916, TOGETHER WITH ALL IMPROVEMENTS, FIXTURES AND APPURTENANCES THERETO, AND MORE PARTICULARLY DESCRIBED AS, TO WIT:

Lots 1 through 9, inclusive, Block A, Carver Park Subdivision, as per plat or map thereof recorded in Plat Book 8, at pages 87 and 88, public records of Lee County, Florida,

Defendant.

WARRANT OF ARREST IN REM

THE PRESIDENT OF THE UNITED STATES OF AMERICA
TO: THE MARSHAL OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

WHEREAS, a verified Complaint for Forfeiture has been filed on the 2nd day of May, 1991, in the United States District Court for the Middle District of Florida, alleging that the real

property and premises described above, with all appurtenances and improvements thereon, was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.F. §§ 801 *et. seq.*, punishable by more than one (1) year's imprisonment and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(6).

And, the Court being satisfied that based on the verified Complaint of Forfeiture there is probable cause to believe that the real property and premises so described was so used or intended for such use, and that grounds for application for issuance of a seizure warrant exist, title having vested in the United States by operation of law;

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said property, entering said property for the purpose of determining the physical condition of the property at the time of the seizure, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this Court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to protect and maintain said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said real property in an open and visible manner notice of such seizure at the time thereof, making the government's seizure open and notorious;

AND FURTHER TO SERVE upon the record owner thereof a copy of this warrant in a manner consistent with the principles of service of process of an action *in rem* under the Supplemental Rules for Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of seizure;

Appendix F

The United States Marshall shall have at his discretion the authority to dispose of, by any means available, perishable, contaminated, flammable, explosive, or violable items. An inventory will be kept as to those items and the method of disposal.

AND UPON APPLICATION of the Plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant;

A RETURN of this warrant shall be made promptly to the court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said property shall file their claims within ten (10) days after the execution of the Warrant or notice of this seizure, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and shall serve and file their answers within twenty (20) days after the filing of the claim with the Office of the Clerk, United States District Court, United States Courthouse, 2301 First Street, Ft. Myers, Florida 33901, with a copy thereof sent to Assistant United States Attorney Robert P. Barclift, United States Attorney's Office, The Barnett Centre, Suite 701, 2000 Main Street, Ft. Myers, Florida 33901.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §§ 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. All persons and entities who have an interest in the defendant property may, in addition to filing a claim or in lieu of

filing a claim, submit a Petition for Remission or Mitigation of the forfeiture for a non-judicial determination of this action pursuant to 28 C.F.R. Part 9.

Dated this 2nd day of May, 1991.

WITNESS THE HONORABLE
s/ Illegible
UNITED STATES MAGISTRATE JUDGE
at Fort Myers, Florida
this 2nd day of May, 1991

DAVID L. EDWARDS, CLERK
United States District Court
Middle District of Florida

By: s/ Janet Morrison
DEPUTY CLERK